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# In the Supreme Court of the United States

**October Term, 1998**

VALERIE COLE,

*Petitioner*

vs.

VINCENT TULLY, M.D. AND
WAYNE MEMORIAL HOSPITAL,

*Respondents*

**Petition for Writ of Certiorari From the Order of the Pennsylvania Supreme Court Dated May 24, 1999 Denying Petition for Allowance of Appeal From the Order of the Superior Court Dated January 13, 1999 at Docket No. 1919 PHL 1998, Which Affirmed the Order of the Court of Common Pleas of Wayne County Dated June 3, 1998, The Honorable Brendan J. Vanston, Specially Presiding, Granting the Motions for Summary Judgment of Respondents/Defendants**

**Petition For Writ Of Certiorari and Appendix**

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## QUESTION PRESENTED FOR REVIEW

Should this Court grant certiorari to determine the constitutionality of the two year statutes of limitations found in 12 P.S. Section 34 (now repealed) and 42 Pa. C.S. Section 5524 (now repealed) as applied to claims of minors, and where the Superior Court decision contravenes United States Supreme Court precedent, the United States Constitution, and the law of other states?

*Suggested Answer: In the affirmative.*

## PARTIES TO THE PROCEEDINGS

VALERIE COLE, Petitioner

VINCENT TULLY, M.D., and WAYNE MEMORIAL HOSPITAL, Respondents

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## CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

Copies of the opinions entered in this case are attached as part of the Appendix hereto. There are no official reports of the opinions entered in this case. A copy of the June 3, 1998 Order and Opinion of the Court of Common Pleas of Wayne County is attached as Appendix. A copy of the January 13, 1999 Order and Opinion of the Pennsylvania Superior Court is attached as Appendix. A copy of the May 24, 1999 Order of the Supreme Court of Pennsylvania denying Petition for Allowance of Appeal is attached as Appendix.

## STATEMENT OF JURISDICTION

The Order sought to be reviewed in this matter was entered on May 24, 1999, by the Pennsylvania Supreme Court, denying Petition for Allowance of Appeal of the January 13, 1999 Order and Opinion of the Pennsylvania Superior Court. The United States Supreme Court has jurisdiction over this matter due to the fact that the Pennsylvania Supreme Court, Pennsylvania's state court of last resort, has issued a final judgment and order pursuant to Supreme Court Rule 13 and 28 U.S.C. § 1257. Additionally, the Petitioner in this action has filed this Petition for Certiorari within 90 days of the Pennsylvania Supreme Court's final order dated May 24, 1999. This petition is timely for purposes of acceptance by this Honorable Court. Sup. Ct. R. 13.

This matter involves the constitutionality of a statute of the Commonwealth of Pennsylvania, and therefore 28 U.S.C. Section 2403 may apply. A copy of this Petition is being served upon the Attorney General for the Commonwealth of Pennsylvania.

## UNITED STATES CONSTITUTIONAL PROVISIONS AND STATUTES TO BE REVIEWED BY THIS HONORABLE COURT

### A. UNITED STATES CONSTITUTIONAL PROVISIONS

**Amendment V.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Amendment XIV.**

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein hey reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legis-

lature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.[[Page 33]]

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## B. STATUTES

Former Title 12 of Purdons, under the Section entitled "Personal Actions" provided:

*Section 34 – Limitations in cases of personal injury.*

> Every suit hereafter brought to recover damages for injury wrongfully done to the person, in case where the injury does not result in death, must be brought within two years from the time when the injury was done and not afterwards; in cases where the injury does result in death the limitations of action shall remain as now established by law.
>
> 1895, June 24, P.L. 236 Section 2 (repealed 1978, April 28, P.L. 202, No. 53, Section 2 (a), effective June 27, 1978)

*Section 35 - Persons under disability may bring action after removal of disability.*

> If *any person or persons*, who is or shall be entitled to any such action *of trespass*, detinue, trover, replevin, actions of account, debt, *actions for trespass*, for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be, or, at the time of any cause off action given or accrued, fallen or come, shall be *within the age of twenty-one years*, feme covert, non compos mentis, imprisoned, or beyond sea, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are hereby before limited, *after their coming to or being of full age*, discoverture, of sound memory, at large, or returning into this province, as other persons.

1713, March 27, 1 Sm. L. 76 Section 5 (repealed, 1978, April 28, P.L. 202, No. 53 Section 2(a)(9), effective June 27, 1978.)

Title 42 of Purdons, under the heading "Limitations of Time" provided as follows:

*Section 5524. Two Year Limitation.*

The following actions and proceedings must be commenced within two years:

(2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

1976, July 9, P.L. 586, No. 142, Section 2, effective June 27, 1978 (Amended, 1982, Dec. 20, P.L. 1409, NO. 326, art. II. Section 201, effective in 60 days)

*Section 5533. Infancy, insanity or imprisonment.*

Except as otherwise provided by statute, infancy, insanity or imprisonment does not extend the time limited by this subchapter for the commencement of a matter.

1978, April 28, P.L. 202, No. 53, Section 10(62), effective June 27, 1978 (Amended, 1984, May 30, P.L. 337, No. 67, Section 1, effective in 30 days)

The above Section 5533 was in effect from June 27, 1978 until June 29, 1984.

Title 42 of Purdons, under the heading "Limitations of Time" currently provides as follows:

*Section 5533. Infancy, insanity or imprisonment.*

(a)General rule. Except as otherwise provided by statute, insanity or imprisonment does not extend the

time limited by this subchapter for the commencement of a matter.

(b)Infancy. If an individual entitled to bring a civil action is an unemancipated minor at the time the cause of action accrued, the period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the same time for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter. As used in this subsection the term "minor" shall mean any individual who has not yet attained the age of 18.

As amended 1984, May 30, P.L. 337, No. 36, Section 1, effective in 30 days.

## STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

On February 5, 1997, Petitioner/Plaintiff filed a Writ of Summons against Respondents/Defendants, Vincent Tully, M.D., and Wayne Memorial Hospital. On May 6, 1997, Petitioner filed a Complaint. This action stems from medical malpractice committed by Respondents in March of 1977, when Petitioner was just one month of age. Petitioner's date of birth is February 17, 1977. Petitioner reached her twentieth birthday on February 17, 1997.

The constitutional issues presented for review on Writ of Certiorari before this Honorable Court were initially raised by Petitioner in response to Motions for Summary Judgment filed by Respondents in the Court of Common Pleas of Wayne County. Respondents sought to dismiss Petitioner's claims, on the basis of a *two year* statute of limitations, without tolling during the Petitioner's minority, based on statutes which have since been repealed and/or amended. Petitioner opposed the summary judgments, contending, inter alia, that the two year statute of limitations for minors was unconstitutional, in violation of both the United States and Pennsylvania Constitutions.

On June 3, 1998, Judge Vanston issued an Opinion and Order, granting the Respondents' Motions for Summary Judgment. Judge Vanston held that the two year statute of limitations under 12 P.S. Section 34, (repealed in 1978), applied, and that the action could not be revived by the 1984 amendments which provided for tolling of the statute of limitations during minority. With regard to the Petitioner's constitutional arguments, the Judge held, "If Section 5533 unfairly discriminates against a certain class of people, it is by virtue of how that statutory provision has been interpreted by the appellate courts of this Commonwealth, and it is to them that the issue

must be addressed, as this court is compelled, under the rule of stare decisis, to follow such appellate authority."

Petitioner filed a Motion for Post-Trial Relief on June 11, 1998, which was denied by Judge Vanston by Order dated June 12, 1998. Petitioner filed a Notice of Appeal to the Pennsylvania Superior Court from the June 3, 1998 Order granting summary judgment. Briefs of Petitioner in the Superior Court again challenged the constitutionality of the two year statute of limitations, under the United States and Pennsylvania Constitutions. The Superior Court entered an opinion dated January 13, 1999, agreeing with the trial court on the constitutional issue. Based on the Superior Court and trial court opinions, Petitioner's statute of limitations would have expired in 1979, when Petitioner was just *two years of age*. By order dated May 24, 1999, the Supreme Court of Pennsylvania denied the Petitioner's petition for allowance of appeal in this matter.

## B. FACTUAL HISTORY

As a result of manifest malpractice by Respondents, Valerie Cole sustained permanent and disabling injuries. Specifically, when Valerie Cole was a *one month old infant*, she became ill, experiencing continuous diarrhea and vomiting. On March 20, 1977, Valerie Cole's mother, Kathleen Rish-Cole, presented Valerie Cole to the Emergency Room of Wayne Memorial Hospital. At the hospital, Valerie Cole was examined by Dr. Vincent Tully. Defendant Tully admitted Petitioner to Wayne Memorial Hospital for treatment until March 28, 1977.

During this eight-day admission, Dr. Tully and the staff of Wayne Memorial Hospital, *inter alia*, failed to recognize the severely dehydrated state of Valerie Cole, failed to order IV fluid replacement therapy, and administered the wrong medication in an incorrect manner. Neither Dr. Tully nor the staff

at Wayne Memorial Hospital requested a neurologist or neurosurgeon to evaluate the infant Petitioner, and allowed her to be discharged on March 29, 1977.

As a result of the dehydrated state, Petitioner suffered a stroke on March 21, 1977, which resulted in brain damage. As a result, Petitioner sustained severe physical injuries and deformities, including a paralyzed arm and leg, and stunted growth and development of both extremities. Petitioner had to undergo multiple medical procedures throughout her childhood. She has a permanent limp and one leg is significantly shorter than the other. Petitioner is unable to engage in any type of employment which requires full use of both upper extremities.

In an effort to bring this matter to a resolution, the parties entered into a Stipulation of Facts. The parties stipulated that Valerie Cole was born on February 17, 1977, and became twenty-two (22) years old on February 17, 1999. Petitioner filed a Writ of Summons on February 5, 1997, within two (2) years of her eighteenth birthday.

Petitioner stipulated that her *mother,* Kathleen Rish Cole, was advised by one of the health care providers during the hospitalization of March 20-28, 1977, that Petitioner, then an infant, may have sustained brain damage and possible physical injuries due to the dehydration which occurred on March 20-21, 1977. It was stipulated that by May, 1977, Petitioner's *parents* were aware that the infant Petitioner had been injured and that these injuries may have been caused by the conduct of the Respondents. Neither Petitioner's parents, nor any other adult acting on behalf of Petitioner, during the period of Petitioner's minority, filed suit against Respondents.

Petitioner has agreed that the statute of limitations has expired for any individual claims her *parents* may have had for medical expenses and other expenses incurred by them arising

from Petitioner's injuries. Petitioner did not stipulate that her individual claims for injuries were barred by the statute of limitations.

Petitioner requests that this Honorable Court exercise its discretion to grant certiorari to hear this appeal, which concerns Federal Constitutional issues, due to the fact that the Superior Court of Pennsylvania has ruled on a federal question in a manner that conflicts with decisions rendered by the United States Supreme Court, as well as with the highest courts of other states. The Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal on May 24, 1999.

## REASONS FOR ALLOWANCE OF THE WRIT

## THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE CONSTITUTIONALITY OF THE TWO YEAR STATUTES OF LIMITATIONS FOUND IN 12 P.S. SECTION 34 (NOW REPEALED) AND 42 PA. C.S. SECTION 5524 (NOW REPEALED) AS APPLIED TO CLAIMS OF MINORS, AND SINCE THE SUPERIOR COURT DECISION CONTRAVENES UNITED STATES SUPREME COURT PRECEDENT, THE UNITED STATES CONSTITUTION AND THE LAW OF OTHER STATES

### A. Reasons to Grant Certiorari

The instant case provides this Court with unique opportunities to prevent unconstitutional and unconscionable application of statutes and avoid manifest inequity and injustice to a seriously and permanently deformed and disabled plaintiff, then an infant, as a result of gross medical malpractice.

Under Supreme Court Rule 13, review of a final order of a state's highest court, the Pennsylvania Supreme Court in the instant matter, is not a matter of right, but of sound judicial discretion, and an appeal will only be allowed when there are special and important reasons. As will be explained in greater detail below, this case meets not just one, but several of the special and important reasons recognized by this Honorable Court to hear an appeal.

In order for this Honorable Court to analyze the issues in this case, a historical review of the relevant statutes of limitations, and their effective dates, is necessary.

Former Title 12 of Purdons, under the Section entitled "Personal Actions" provided two applicable statutes of limita-

tions. Section 34, entitled "Limitations in cases of personal injury" was enacted in 1895, and provided, in pertinent part, "Every suit hereafter brought to recover damages for injury wrongfully done to the person ... must be brought within two years from the time when the injury was done ..." 12 Pa. S. 34.

Section 35, enacted in 1713, was entitled "Persons under disability may bring action after removal of disability" and provided, in part "If *any person or persons,* who is or shall be entitled to *any such action of trespass* ... shall be *within the age of twenty-one years* ..., then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are hereby before limited ... *after their coming to or being of full age.* ..." 12 Pa.S. 35.

Effective June 27, 1978, the General Assembly repealed Sections 34 and 35 and enacted 42 Pa. C.S.A. Sections 5524 and 5533, under the heading "Limitations of Time". Section 5524 was entitled "Two Year Limitation" and provided "An action to recover damages for injuries to the person ... caused by the wrongful act or neglect ... or negligence of another" must be commenced within two years. Section 5533 provided that infancy, insanity or imprisonment did not extend the time limit for commencement of an action. Sections 5524 and 5533 were in effect from June 27, 1978 until June 29, 1984, and did not provide any tolling provisions for minors.

Effective June 29, 1984, 42 Pa. C.S. Section 5533, was amended to once again provide a tolling provision for minors. Section 5533, as amended in 1984, provided that the period of minority should not be included in the time period within which the action must be commenced, and the minor would have the same time for commencing an action after attaining majority as is allowed to others. 42 Pa.C.S.A. 5533. Section 5533 has remained unchanged to the present.

Section 5524 (2), which applies to actions to recover damages for injuries to the person, remains unchanged from the 1978 version. As of 1984 to the present, under Section 5533, once again there is a tolling provision for minors, which allows until the individual's twentieth birthday to bring suit based in negligence.

**B.The Violation of Due Process and Equal Protection as Guaranteed By The United States Constitution**

The malpractice in this case occurred in March, 1977. Under the lower court decisions which applied the statute of limitations in effect in 1977, Petitioner's statute of limitations would have expired in 1979, when Petitioner was just *two years of age*. In the courts below, Petitioner argued that the two year statute of limitations for minors in 12 P.S. 34 (which was in effect in 1977) and 42 Pa. C.S.A. 5533 (prior to 1984 Amendments) were unconstitutional under both the Federal and State Constitutions. Specifically, the two year limitation violates the provisions of Fourteenth Amendment of the United States Constitution regarding Equal Protection and Due Process.

The United States Supreme Court has held that the "same statute may be in part constitutional and in part unconstitutional, and if parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794, 472 U.S. 491, 86 L.Ed.2d 394, 53 USLW 4793 (1985).

Respondents claim that Valerie Cole cannot benefit from the 1984 amendments which provided for tolling provisions, but rather must follow the statute which was in effect in 1977 when the malpractice occurred. If the two-year statute of limitations is held applicable to Valerie Cole's claims, this means that the statute would have run in 1979, when Valerie

was just *two years* of age. Then the only way for Valerie Cole's claims to proceed is by declaring the two year statute unconstitutional.

The Pennsylvania Supreme Court has ruled that a minor plaintiff's injuries give rise to two separate and independent causes of action. *Schmidt v. Kratzer*, 402 Pa. 630, 168 A.2d 585 (1961). One cause of action vests in the child for the child's injuries, pain and suffering and loss of earnings after the age of majority. The other cause of action vests in the parents for medical expenses and loss of services during the child's minority.

While Valerie Cole's *parents' claims (for medical expenses, etc)* are properly barred by their failure to act, Valerie Cole's own individual claims should not be. It is completely inequitable, unconscionable and grossly unconstitutional for Valerie Cole's *personal and independent claims for injuries* to be barred by her *parents' failure* to act timely. It is not Valerie Cole's parents who must live with their decision. It is Valerie Cole.

It is not unfair to hold Respondents liable under the tolling statute. If the malpractice in this case (or any other case involving a minor) occurred at any time after the 1984 amendments allowing tolling, undeniably, Respondents would be required to defend against those suits, for up to twenty years after the injury. Respondents would suffer no greater prejudice from defending this lawsuit than any other lawsuit involving a minor after the tolling provisions were enacted.

Since the constitutionality of these statutes will affect other minors in addition to Valerie Cole, who is severely and permanently disabled, this is a matter of public importance which requires prompt and definitive resolution by this Honorable Court. This case is the classic example of a federal question being decided in a manner that conflicts with the

relevant decisions of the United States Supreme Court, as well as a decision rendered that conflicts with decisions of other state courts of last resort. Sup. Ct. R. 10.

In the instant case, the two year statute of limitations for minors violates both federal and state due process and equal protection.

**1. Procedural Due Process**

The United States Supreme Court has held that due process under the United States Constitution requires notice and an opportunity to respond or heard. *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487, 470 U.S. 532 (U.S. Ohio, 1985); *Logan v. Zimmerman Brush Company*, 102 S.Ct. 1148; 455 U.S. 422 (U.S. Ill. 1982). Additionally, this Honorable Court has also held that, with regard to procedural due process claims, while the deprivation of an individual's constitutionally-protected interest by state action is not by itself unconstitutional, "the deprivation of such an interest without due process of law" is. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S.Ct. 2199 (1999).

Similarly, the Pennsylvania Supreme Court goes further and holds that procedural due process requires: (1) adequate notice; (2) a meaningful opportunity to be heard at a meaningful time and in a meaningful manner; and (3) a chance to defend oneself before an impartial tribunal. *Lyness v. Commonwealth Board of State Medicine*, 604 A.2d 1204 (Pa. 1992); *Plowman v. Plowman*, 597 A.2d 701 (Pa. Super. 1991), citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976). When considering procedural due process, the court does not engage in the "scrutiny" analysis. Rather, the Court simply determines whether the required elements have been met.

Here, none of the requirements of procedural due process were met, with regard to both the Federal and Pennsylva-

nia State Constitution. Petitioner, an infant at the time of the malpractice, did not have notice required for due process. Petitioner, a one month old infant, had no notice of her legal rights. She had no notice her claims would be barred by the age of two years.

Petitioner also had no meaningful opportunity to be heard. As an infant, Petitioner could not comprehend the nature of a lawsuit or her injuries. She had no means to communicate her desire to bring suit, or to contact someone to bring suit for her.

Petitioner also had no opportunity to prosecute her claims before an impartial tribunal. As an infant, or even a minor under the age of eighteen, Valerie Cole would be *legally barred* from bringing suit on her own until after she reached the age of eighteen, *after the two year statute of limitations already expired. DeSantis v. Yaw*, 434 A.2d 1273 (Pa. Super. 1981). *Applying the two year statute leads to the unconscionable result of barring Petitioner's claims before she could legally bring them.* Here, by the time Petitioner was old enough to comprehend her injuries and the effect of those injuries (and legally bring suit herself), her suit was already barred. This result cannot withstand constitutional muster.

If a two year statute of limitations applies, a minor child is barred from any opportunity to be heard in court, unless the parents choose to file suit. Since it is the child's rights which are at issue, *the child* must be afforded due process in order to preserve those rights. *Sax v. Votteler*, 648 S.W.2d 661 (Supreme Court, Texas, 1983) Requiring a child to rely on a parent to bring a claim does not afford a meaningful opportunity to the child to be heard in Court, since the parent may have other concerns against bringing a lawsuit, including moral, social or religious reasons: the parents may have a relationship with the potential defendant, may fear the pub-

licity or emotional strain of suit, or may have religious aversions to suit. The United States Supreme Court stated specifically that "the right to a meaningful opportunity to be heard within the limits of practicality must be protected against denial by particular laws that operate to jeopardize it for particular individuals." *Boddie v. Connecticut*, 91 S.Ct. 780, 401 U.S. 371 (U.S. Conn. 1971).

**2. Equal Protection and Substantive Due Process**

The two year statute of limitations as applied to minors also violates the equal protection and substantive due process clause of the Federal and State Constitutions.

The United States Supreme Court, in interpreting the Fourteenth Amendment of the United States Constitution, specifically states that "unless a statute invokes strict judicial scrutiny because it interferes with the fundamental right ... it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadrmas v. Dickinson Public Schools*, 108 S.Ct. 2481,. 487 U.S. 450 (1988).

Where a right infringed has its source, explicitly or implicitly in the Constitution, strict scrutiny applies and there must be a compelling governmental purpose. *Plyer v. Doe*, 457 U.S. 202, 102 S.Ct. 2382 (1982); *Commonwealth v. Keenan*, 347 Pa. 574, 33 A.2d 244 (1943); *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147 (1853). In Pennsylvania, the right of access to courts is specifically found in Article I, Section 11 of the Pennsylvania Constitution, triggering strict scrutiny. *See DeSantis v. Yaw*, 434 A.2d 1273 (Pa. Super. 1981) (a chose in action is a form of personal property that belongs to the injured child, and therefore involves a fundamental right).

The Pennsylvania Supreme Court has held that everyone is guaranteed a remedy for his or her injuries and an open court in which to air his or her grievances. *Commonwealth v.*

*Keenan*, 347 Pa. 574, 33 A.2d 244 (1943); *Sharpless*, supra. Here, the fundamental right of Valerie Cole, or any minor, is abridged by the two-year statute of which unreasonably denies access *of certain classes* of injured minors to the courts.

During the same time when the statute of limitations under Section 34 was construed as two years *for personal injuries to the minor*, the statute of limitations for *damages to property of minors* was tolled until after the age of majority, under Section 35. *Fassitt v. Seip*, 95 A. 273 (Pa. 1915) During this same time period, the Pennsylvania legislature also created an exception allowing tolling of minors' statute of limitations for *motor vehicle* accidents under the No Fault Act. *Salvado v. Prudential*, 430 A.2d 297 (Pa. Super 1981). Respondents claim the constitutional issues should be analyzed under the "rational basis" test. Petitioner disagrees. Nonetheless, even under the rational basis test relied upon by Respondents, the statute denies equal protection. There can be no rational basis, let alone a compelling reason, to distinguish between property damage claims/motor vehicle claims on one hand and non-motor vehicle claims on the other. Pennsylvania can have no greater interest in preventing stale or fraudulent personal injury claims for minors in non-motor vehicle accidents, than motor vehicle accidents or property damage claims, which were tolled, by statute, during the same time period. *Fassitt, supra., Salvado*, supra. Moreover, the United States Supreme Court has stated that "equal protection demands that States eliminate unfair disparities between classes of individuals. *Pennsylvania v. Finley*, 107 S.Ct. 1990, 481 U.S. 551 (U.S. Pa. 1987). The fact that in 1984 the General Assembly again enacted tolling provisions for minors in all cases, including personal injury cases, demonstrates that the state does not view its interest in avoiding stale or fraudulent claims as more important than the right of a minor to bring suit after majority.

The General Assembly has created an unequal distribution of benefits and imposition of burdens for minors suffering injuries in non-motor vehicle accidents as opposed to minors involved in motor vehicle accidents or property damage. This is simply not rational. *See Clark v. Jeter*, 108 S. Ct. 1910, 486 U.S. 456 (1988) (where other paternity actions allowed greater time limits, six year paternity statute for illegitimate children was not substantially related to Pennsylvania's interest in avoiding stale or fraudulent claims.)

### C. The Pennsylvania Superior Court Decisions On The Constitutionality Of The Two Year Statute Of Limitations As Applied To Minors Conflict With Precedent Of The United States Supreme Court

Discussions of the constitutionality of this issue within Pennsylvania have taken place before. There are Superior Court cases which discussed the constitutionality of the two-year statute of limitations for minors, namely, *DeSantis v. Yaw*, 434 A.2d 1273 (Pa. Super. 1981), which was cited in *Petri v. Smith*, 453 A.2d 342 (Pa. Super. 1982) and *Stein v. Washington*, 302 Pa. Super. 124, 448 A.2d 558 (1982). These cases were relied on by the courts below in rejecting Petitioner's constitutional claims.

A review of the Superior Court decision of *DeSantis v. Yaw*, 290 Pa. Super. 535, 434 A.2d 1273 (1981) reveals that the Court was highly critical of the two year statute of limitations for minors, but yet felt constrained to follow it in light of "settled" precedent. The *DeSantis* Court noted, "The decision is not a comfortable one, however, and it is our opinion that this question deserves serious reconsideration by the courts at this time. Recent advances in the laws regarding children's rights have made an automatic decision growing out of a tradition that viewed children as possessions completely unpalatable." *Id.*

The statements made by the Superior Court in *DeSantis* actually support Petitioner's arguments in this case that the minor's two-year statute is *unconstitutional*. In *DeSantis*, the Superior Court noted that the right to a chose in action is regarded as a form of property, and is a *fundamental right* which now belongs to the child himself, yet he is legally barred from pursuing his claim. The *DeSantis* Superior Court noted that the two year statute was designed to "force a claimant incapable of acting to act". The Court recognized that the statute was not equally applied to minors are parents alike, since, minors were not allowed under the law to initiate their own suits, and the statute "does in fact prevent minors, simply because of their status as minors, from bringing suit." *Id.*

The *DeSantis* Superior Court went on to note that there would be many reasons why a parent might not bring suit within the two year statute, including emotional strain, laziness, ignorance, or religious concerns, stating, "The situation comes to this: a personal property right belonging to a legally faultless citizen may and often has been forfeited because no legally competent party has volunteered to undertake an action in the child's behalf. By the time the child reaches maturity the property has vanished. For this, it appears, no one is responsible. Can this lack of remedy comport with due process?" *Id.*

The *DeSantis* Court noted equal protection concerns were raised since, "Children injured tortiously during their minority are at present unequally treated: children injured by motor vehicle may bring suit during their entire minorities by an adult and for another two years in their own name. Children tortiously injured in any other manner have a two-year statutory limit and may enforce their claims only through the voluntary services of an adult, unless they happen to attain majority during the statutory period." *Id.*

The Superior Court in *DeSantis* ended by calling for legislative action, stating that the statute has no redeeming constitutional features. The Superior Court fell short of declaring the act unconstitutional, although clearly suggesting that it was.

Even though *DeSantis* was effective in spurring legislative change in 1984, this change will not aid the Petitioner's cause, since it was found by the lower courts that the two year statute under either 12 P.S. Section 34 or 42 Pa.C.S.A. Section 5533 (prior to the 1984 amendments) apply to this case.

After *DeSantis*, was rendered, the United States Supreme Court rendered a decision in 1988 in *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910 (1988), which originated from Pennsylvania. The *Clark* case involved a support action filed on behalf of a minor child against the putative father. The father raised the six year statute of limitations for paternity actions as a defense. After the plaintiff filed an appeal to the Superior Court, the General Assembly enacted an eighteen year statute of limitations for paternity actions. Plaintiff sought to retroactively apply that statute of limitations to the action.

In *Clark*, the plaintiff argued that the six year paternity statute was unconstitutional on due process grounds since the statute required that the action be brought by the person having custody of the child and, although it was the child's right to support, the child's custodian had exclusive control to exercise or not to exercise the child's right. Thus, by failing to commence an action for the child's support within the statute of limitations, the custodian could forfeit the child's right to receive support from the putative father. The plaintiff next argued that the statute denied equal protection to children born out of wedlock. *See Clark*, 518 A.2d 276 (Pa. Super. 1986). The constitutional arguments made by the plaintiff in

*Clark* are virtually identical to the arguments being made by Petitioner herein.

In *Clark*, the Pennsylvania Superior Court held that the eighteen year statute could not be retroactively applied and was not unconstitutional. *Id.*

The Pennsylvania Supreme Court declined to hear the case. However, the United States Supreme Court granted certiorari. Justice O'Connor, delivering the opinion for a *unanimous* Court, held that the six year paternity statute was unconstitutional, applying an intermediate scrutiny test. The United States Supreme Court held that the statute violated equal protection and was not substantially related to an important governmental objective in avoiding stale or fraudulent claims, since there were other Pennsylvania statutes in effect at the same time, which allowed paternity to be litigated more than six years.[1]

In reaching this holding in *Clark*, this Court reasoned:

> We are, however, confident that the 6-year statute of limitations is not substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims. In a number of circumstances, Pennsylvania permits the issue of paternity to be litigated more than six years after the birth of an illegitimate child. The statute itself permits a suit to be brought more than six years after the child's birth if it is brought within two years of a support payment made by the father. And in other types of suits, Pennsylvania places no limits on when the issue of paternity may be litigated. For example, the intestacy statute, 20 Pa. Cons. Stat. §2107(3) (1982), permits a child born out of wedlock to establish paternity as long as

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1 Since the Court decided the case on equal protection grounds, it did not reach the due process claim.

'there is clear and convincing evidence that the man was the father of the child.' Likewise, no statute of limitations applies to a father's action to establish paternity. *In re Mengel,* 287 Pa. Super. 186, 429 A.2d 1162 (1981). Recently, the Pennsylvania Legislature enacted a statute that tolls most other civil actions during a child's minority. 42 Pa. Cons. Stat. §5533(b) (Supp. 1987). In *Pickett and Mills,* similar tolling statutes cast doubt on the State's purported interest in avoiding the litigation of stale or fraudulent claims. 462 U.S., at 15-16, 103 S.Ct., at 2207-08; 456 U.S., at 104-105, 102 S.Ct., at 1557-58 (O'CONNOR, J., concurring); *id.,* at 106, 102 S.Ct. at 1558 (Powell, J., concurring in judgment). Pennsylvania's tolling statute has the same implications here.

A more recent indication that Pennsylvania does not consider proof problems insurmountable is the enactment by the Pennsylvania Legislature in 1985 of an 18-year statute of limitations for paternity and support actions. 23 Pa. Cons. Stat. §4343(b) (1985).

*Clark v. Jeter,* 108 S.Ct. 1910, 1916 (U.S. Pa. 1988)

Petitioner submits that the reasoning of the *Clark* decision holding the six year paternity statute unconstitutional applies equally here to void the two-year minor's statute, and the Superior Court decision in this case (as well as *DeSantis, Petri* and *Stein)* are inconsistent with United States Supreme Court precedent in *Clark.*[2]

The same concerns expressed by plaintiff in *Clark* in arguing the paternity statute was unconstitutional apply to

---

2 The Superior Court decisions discussing the two year statute of limitations for minors cited the Superior Court decision in Clark before the United States Supreme Court overruled *Clark* in 1988. *Lewis v. City of Philadelphia,* 520 A.2d 874 (Pa. Super. 1987), demonstrating that the Superior Court viewed the paternity statute as analogous to the two year minors' statute for civil actions.

minor's personal injury suits, i.e. although it is the *child's* cause of action at issue, if the parent fails to file a claim within the statute, the child's cause of action will be lost. Just as in *Clark*, in the instant case, during the same time Pennsylvania had a two year minor's statute for personal injury claims, the General Assembly allowed for tolling of minor's claims for contract, property damage, or motor vehicle accident cases. Even under a rational basis test, this discrimination and unequal treatment of different classes of people is completely irrational, arbitrary and unconstitutional.

Here, the interests of Valerie Cole in bringing a suit for permanent and disabling injuries are equally, if not more, significant than the minor's interest in *Clark*, which involved a paternity claim for financial support. In a paternity action, the mother receives the pecuniary benefit of making a paternity claim, i.e. to help defray her costs of raising the child, and therefore would have an incentive to file a paternity claim on behalf of the child. In a civil suit for injuries, the parents have less incentive to preserve the *child's independent claims for personal injuries*, since the child will receive those monies, not the parents. If *six years* is not long enough to allow a paternity claim to be made for financial support, two years cannot be long enough to allow a minor to bring a claim for personal injuries, especially where the child is legally barred from doing so until after the age of majority.

The Superior Court decision in this case, as well as current Pennsylvania law concerning Valerie Cole, completely ignores the United States Supreme Court decision in *Clark*, which reversed the Superior Court decision on the paternity statute. The Superior Court decision in this case conflicts with United States Supreme Court precedent, which is a recognized reason for this Honorable Court to hear this appeal.

Petitioner submits that this Court must hear this appeal to prevent the manifest inequity that will result to this Petitioner if the two year statute, which has since been repealed, is applied. Since the two year statute for minors has since been replaced by a tolling provision, this Court will not cause mass upheaval by declaring the statute unconstitutional. The tolling provisions have been in effect since 1984. There would only be a limited class of plaintiffs and defendants affected, i.e. minors who were injured between 1979 and 1984. Those whose injuries occurred prior to 1979 would already be barred (even with the tolling), and those whose injuries occurred after 1984 would already benefit from the 1984 tolling statute. Yet for that class of plaintiffs, including Valerie Cole, this is a matter of substantial importance, since those minors risk losing their right to file a claim for life-long, disabling injuries.

It is not right that Valerie Cole's claims should be barred by an antiquated statute enacted when children were considered property of their parents. With the force of *Clark v. Jeter,* Petitioner urges this Honorable Court to grant certiorari and review the constitutionality of the two year statute as applied to minors.

### D. The Decisions Of The Highest Courts Of Other States Have Declared Similar Two Year Statutes Unconstitutional

The Pennsylvania Superior Court decision is also inconsistent with the highest law of other states which faced with this issue. The Texas Supreme Court declared a two year statute of limitations for minors medical malpractice actions unconstitutional, under the Texas open courts provision. *Sax v. Votteler,* 648 S.W.2d 661 (Supreme Court, Texas 1983). In doing so, the Court noted the statute effectively abolished a minor's right to bring an established common-law cause of action without providing a reasonable alternative, since a child

had no right to bring a cause of action on his own until after majority, and it was unreasonable to require the child to rely on parents, guardians or next friends to take action or be barred from any remedy.

Courts in Ohio, Missouri, and Arizona have found similar statutes of limitations unconstitutional with respect to minors. *Adamsky v. Buckeye*, 73 Ohio. St. 3d 360, 653 N.E.2d 212 (1995) (two year statute of limitations unconstitutional as applied to minors, since minors lack standing to bring suit before reaching majority, and thus were denied equal protection, even under rational relation test); *Barrio v. San Manuel*, 143 Ariz. 101, 692 P.2d 280 (1984) (statute of limitations which required minors injured below age of seven to bring action for medical malpractice by the age of ten violated fundamental right to bring cause of action and did not provide reasonable alternatives, since it abolished action before it could be reasonably brought); *Strahler v. St. Luke's*, 706 S.W.2d 7 (Supreme Court Missouri, 1986) (two year statute for minors unconstitutional since it violated the "open courts" provision of the state constitution, since the minor was legally incapable of bringing suit on his own, and it was unreasonable to require the minor to rely on a parent or legal guardian to bring suit). *See also Wasson v. Weiner*, 900 S.W.2d 316 (Supreme Court, Texas, 1995) (medical malpractice statute which tolled statute until the minor's 12th birthday violated the "open courts" provision of the state constitution).

Petitioner requests this Court give Petitioner an opportunity to present arguments as to why this Court should follow the law of these other states, and declare the two year statute unconstitutional.

It is patently unfair and inequitable to legally prevent Valerie Cole from being able to bring suit, yet find she is time-barred for her *parents'* failure to do so. In this case, it is

Valerie Cole, nor her parents, who are being left without a remedy. Valerie Cole should not be prejudiced by her parents' inaction. Valerie Cole has been left with catastrophic injuries and paralysis as a result of Respondents' malpractice. She should not be injured once again at the hands of the Court by leaving her without a remedy for her injuries.

## CONCLUSION

For any or all of the above reasons, Petitioner, Valerie Cole, submits that special and important reasons exist for this Court to review the Pennsylvania Superior Court and trial court decisions granting summary judgment in favor of Respondents and dismissing Petitioner's claims.

Respectfully submitted,

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*Petitioner, Valerie Cole*

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## CERTIFICATE OF SERVICE

AND NOW, this 20th day of August, 1999, I, Joseph P. Lenahan, Esquire, as counsel for the Petitioner, Valerie Cole, do hereby certify that I, this day served three true and correct copies of the foregoing Petition for Writ of Certiorari and Appendix to all parties of record, counsel and other interested parties, by United States first class mail, postage prepaid and addressed as follows:

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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 120 M.D. Allocatur Docket 1999

Petition for Allowance of Appeal from the Superior Court

VALERIE COLE,

Petitioner

v.

VINCENT TULLY, M.D., and
WAYNE MEMORIAL HOSPITAL,

Respondents

ORDER

PER CURIAM:

AND NOW, this 24th day of May 1999, the petition for allowance of appeal is denied.

TRUE & CORRECT COPY
ATTEST: May 25, 1999
/s/SHIRLEY BAILEY
CHIEF CLERK

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1919 Philadelphia 1998

VALERIE K. COLE,

Appellant

v.

VINCENT TULLY, M.D., AND
WAYNE MEMORIAL HOSPITAL,

Appellees

Appeal from the Order in the Court of Common Pleas of Wayne County, Civil Division, No. 52 CIVIL 1997

BEFORE: CAVANAUGH, HESTER and TAMILIA, JJ.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of WAYNE County be, and the same is hereby AFFIRMED.

BY THE COURT:
/s/David A. Szewczak
PROTHONOTARY

Dated: JANUARY 13, 1999

IN THE SUPERIOR COURT OF PENNSYLVANIA
No. 1919 Philadelphia 1998
VALERIE K. COLE,

Appellant

v.

VINCENT TULLY, M.D., AND
WAYNE MEMORIAL HOSPITAL,

Appellees

Appeal from the Order in the Court of Common Pleas of Wayne County, Civil Division, No. 52 CIVIL 1997

BEFORE: CAVANAUGH, HESTER and TAMILIA, JJ.

MEMORANDUM:

Valerie Cole appeals from the June 3, 1998 Order granting summary judgment for appellees, Vincent Tully, M.D., and Wayne Memorial Hospital, in appellant's medical malpractice case against them.

Appellant now challenges the constitutionality of the two-year statute of limitations as applied to her case and argues, even if constitutional, the statute should have been tolled by application of 42 Pa.C.S.A. §5533, which provides:

> *§5533. Infancy, insanity or imprisonment*
>
> *(a) General rule.*—Except as otherwise provided by statute, insanity or imprisonment does not extent [sic] the time limited by this subchapter for the commencement of a matter.
>
> *(b) Infancy.*—If an individual entitled to bring a civil action is an unemancipated minor at the time the cause of action accrues, the period of minority shall not be deemed a portion of the time period within which the action must be commenced. Such person shall have the

same time for commencing an action after attaining majority as is allowed to others by the provisions of this subchapter. As used in this subsection the term "minor" shall mean any individual who has not yet attained the age of 18.

In the alternative, appellant argues the "discovery rule" tolled the statute of limitations as appellant could not reasonably have discovered her injury as she was merely an infant when the injury was sustained. Appellant was one-month old at the time of the alleged medical malpractice; she did not commence this civil suit until she was 19 years old.

Appellees maintain, and the trial court agrees, the action is time-barred in that the 1984 amendments to section 5533 do not apply to appellant's case as her injury was sustained more than two years prior to 1984 and legal action was barred under the prior statute of limitations. In response to appellant's argument that the interpretation placed on the application of section 5533 and the discovery rule unlawfully discriminates between the class of persons born between 1978 and 1984, the trial court asserts the appellate courts of Pennsylvania have considered this issue and decided there is no discrimination and section 5533 may not be given retroactive effect. (Trial Court Opinion, Vanston, P.J., 6/3/98, p. 2.) We agree.

As noted by the trial court, three well-considered cases by this Court carefully have reviewed the issues presented by this case, including the application of the discovery rule to a case filed by an adult, who was the alleged minor victim of sexual abuse 21 years before.

In *Pearce v. Salvation Army*, 674 A.2d 1123 (1996), this Court held that preliminary objections were properly sustained in a case where appellant was an alleged victim of child sexual abuse by a Salvation Army agent between 1969 and 1973 and that the statute of limitations in effect at that time barred

the extension of the statute for those charges and no retroactive effect could be given to section 5533 permitting commencement of the action within two years of majority at 18. That case also barred application of the discovery rule and noted this Court's decision in *Larthey by Larthey v. Bland*, 532 A.2d 456 (Pa. Super. 1987), *appeal denied*, 518 Pa. 656, 544 A.2d 1143 (1987). The *Larthey* Court held the discovery rule could not apply to toll the statute of limitations in a medical malpractice case where the parents knew within one month of the birth of the child, of the alleged negligent handling of the birth and delivery by the obstetrician and the injuries sued upon were caused during the delivery. The parents had two years between the time of discovery in July or August 1979 and the time the action was barred in 1981. The extension of the statute of limitations to toll its running for minors, after the 1984 amendment, does not revive an action nor does it trigger an application of the discovery rule to the minor, despite his/her incapacity. *See Pearce, supra.* The lack of capacity of the appellant either due to minority or mental incapacity relating to the child's minority does not extend the discovery rule until the child reaches majority, *Redenz by Redenz v. Rosenberg*, 520 A.2d 883 (Pa. Super. 1987), *appeal denied*, 516 Pa. 365, 533 A.2d 93 (1987).

In keeping with the Opinion and findings of the able trial Judge Brendan J. Vanston, P.J., we affirm the Order of summary judgment entered as a matter of law in favor of Vincent Tully, M.D., and Wayne Memorial Hospital.

Order affirmed.

IN THE COURT OF COMMON PLEAS OF THE
22nd JUDICIAL DISTRICT
WAYNE COUNTY—CIVIL ACTION—LAW
NO. 52-CV-1997
VALERIE COLE, Plaintiff
vs.
VINCENT TULLY, M.D., and
WAYNE MEMORIAL HOSPITAL, Defendants

ORDER

AND NOW, the 3rd day of June, 1998, for the reasons set forth in the opinion of the court of even date, there being no genuine issue of material fact, and the defendants being entitled to judgment as a matter of law,

IT IS ORDERED that the defendants' Motions for Summary Judgment are granted, and the Prothonotary is directed to enter judgment in favor of Wayne Memorial Hospital and Vincent Tully, M.D., and against Valerie Cole.

By the court,
/s/BRENDAN J. VANSTON,
President Judge
44th Judicial district
Specially Presiding

IN THE COURT OF COMMON PLEAS OF THE
22nd JUDICIAL DISTRICT
WAYNE COUNTY—CIVIL ACTION—LAW
NO. 52-CV-1997
VALERIE COLE, Plaintiff
vs.
VINCENT TULLY, M.D., and
WAYNE MEMORIAL HOSPITAL, Defendants

Christine S. Lezinski, Esquire, LENAHAN & DEMPSEY, P.C.—for the Plaintiff;

Carl E. Barlett, Esquire, McCORMICK LAW FIRM—for Wayne Memorial Hospital;

Thomas M. Chairs, Esquire, MARSHALL, SMITH & HADDICK, P.C.—for Vincent Tully M.D.

OPINION

Vanston, P.J., 44th Judicial District, Specially Presiding, June 3, 1998:

This matter is before the court for disposition of the Motions for Summary Judgment filed by the defendants. The sole issue before the court involves the applicable statute of limitation.

The facts of the matter are not in dispute.

In March 1977, Valerie Cole was a one-month-old infant. Suffering from diarrhea and vomiting, she was taken by her mother to the defendant hospital where she was examined and treated by the defendant physician. The child was admitted to the hospital and treated for a period of eight days. It is now asserted that the hospital and the physician negligently treated her during that period, to the extent that she suffered some form of cerebral accident (stroke), causing brain damage resulting in partial and permanent paralysis of extremities.

The plaintiff's parents brought no action against the defendants for their alleged negligence. Rather, in February 1997, the plaintiff, by this time nineteen years of age, commenced the instant action. The defendants have answered her complaint, averring that the action is time barred by the applicable statute of limitation.

This being a personal injury action, the time limitation is two years. See 42 Pa.C.S.A. Sec. 5524. On the date of the alleged injury, the limitation period was also two years. See 12 P.S. Sec. 34, repealed in 1978.

In 1984, the Legislature of Pennsylvania amended Section 5533, concerning the tolling of the statute of limitation during a child's minority. The amendment provided that a child who is personally injured during his or her minority has two years following the attaining of the age of majority in which to commence an action.

It has been held, however, that the 1984 amendment could not revive a case which was already time barred (as here) as of the time of that amendment. See, inter alia, *Pearce vs. Salvation Army*, 449 Pa.Super. 654, 674 A.2d 1123 (1996); *Larthey by Larthey vs. Bland*, 367 Pa.Super. 67, 532 A.2d 456 (1987); *Redenz by Redenz vs. Rosenberg*, 360 Pa.Super. 430, 520 A.2d 883 (1987).

Plaintiff in the instant matter now asserts that Section 5533, as applied in this situation, unlawfully discriminates against that class of persons born between 1978 and 1984 who may have been injured during that time frame. Further, she asserts that such an interpretation violates the "open courts" provision of the Pennsylvania Constitution )see Article 1, Section 11). She is unable to cite, however, any Pennsylvania appellate authority for her interesting arguments.

If Section 5533 unfairly discriminates against a certain class of people, it is by virtue of how that statutory provision

has been interpreted by the appellate courts of this Commonwealth, and it is to them that the issue must be addressed, as this court is compelled, under the rule of stare decisis, to follow such appellate authority.

Accordingly, the Motions for Summary Judgment must be granted.